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USE OF THE QUR'ĀN IN KEY PAKISTANI COURT DECISIONS ON *ZINĀ'* AND *QAḎF*

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Introduction

THIS article is about the Pakistani codification and application of what is known in the Islamic *fiqh* as *zinā'*, illicit sex whether voluntary between two persons of the opposite sex who are not married to each other or rape between two persons of the opposite sex, and *qaḏf*, accusation of *zinā'*.

Enactment of the Zina *and* Qazf *Ordinances*

In 1979 Zia ul Haq codified what he thought to be the Islamic law of *zinā'* and *qaḏf* in "Ordinance VII of 1979: Offence of Zina (Enforcement of Hadood) Ordinance, 1979" and "Ordinance VIII of 1979: Offence of Qazf". These Ordinances were part of the movement to reform the Pakistani laws to make them conform to Islamic law. The Ordinances do not quote any verses from the *Qur'ān* or any *aḥādīṯ* or any jurists. The Ordinances also do not specify that in case the court finds the wording of the Ordinance unclear then the court is to rely on the traditional source of Islamic law including the *Qur'ān* to interpret the Ordinance.

Nonetheless the courts have decided on their own to rely on traditional juridicial Islamic works and their own exegesis of the *Qur'ān* as well as of the *aḥādīṯ* when they find that they cannot settle a dispute with an interpretation of the Ordinance alone. This has amounted to a kind of self-evident *iǧtihād* the premises of which have not been explicitly laid down. This aside, a jurist might question reliance on sources other than the Ordinance itself because no person may be punished

criminally except according to the text of the law that has been enacted by the state. (derived from *sūra* 17:15: no punishment until a messenger has been sent).[1]

Case Studies

In this part I wish to analyse five criminal law cases in which the courts have used the verses of the *Qur'ān* to support their decisions, sometimes to reach contradictory results. It is not in every case of *zinā'* or *qaḏf* that the courts resort to interpreting the *Qur'ān*, only in very controversial cases. It is the Federal Shariat Court that was instituted under Chapter 3A of the Constitution that has the authority to decide whether a law contravenes the *Qur'ān* and the *sunna* of the Prophet.

Case of zinā': *The Bakhsh Judgment of 1981*

The first case is Hazoor Bakhsh vs Federation of Pakistan/M.I. Chaudry vs. Islamic Republic of Pakistan, PLD 1981 FSC 145 before the Federal Shariat Court. The petitioners challenged §5 of the Hudood Ordinance which prescribes stoning to death for a Muslim man and woman who voluntarily had sexual relations without being married to each other. This section had been enacted on the assumption that the penalty for illicit sex under Islamic law is death. The petitioners asserted that the death penalty was not a *ḥadd* penalty and therefore not required under Islamic law. Indeed the death penalty violated Islamic law because no one is to be punished unless a specific punishment has been prescribed in the *Qur'ān*.[2] The argument forced the Court to consider what is *ḥadd*.

To find a definition, the Court could not refer to the *Qur'ān* (at p. 224). *Ḥadd* is used in the *Qur'ān* many times in connexion with marital relations, meaning the limits set by God, but not criminal.[3] This means that even though the word *ḥadd* is used for example to warn married persons to separate once they have found that they cannot keep within the limits set by God, there is no punishment specified for

[1] See Muhammed Selim El-Awa, "Approaches to the *Sharī'a*: A Response to N.J. Coulson's *A History of Islamic Law*", *Journal of Islamic Studies*, 2/2 (1991), pp. 143-179, at p. 163.

[2] See also Abdul Qadir 'Oudah Shaheed, *Criminal Law of Islam*, I, Karachi, International Islamic Publishers, 1987, p. 72.

[3] Adel El Baradie, *Gottes-Recht und Menschen-Recht. Grundlagenprobleme der islamischen Strafrechtslehre*, Baden-Baden, Nomos, 1983, p. 96.

those who do not follow this advice (2:229, 230).[4] The word refers from a juridical point of view more to what rights God is conferring in specified situations, e.g. the right of the husband to accept back a gift he had given to his wife in case he has let her go because she no longer wants to continue in the marriage (2:229).

For lack of a criminal definition of *ḥadd* in the *Qur'ān* the Pakistani Court had to rely on secondary literature of the jurists, who had defined *ḥadd* as a punishment fixed by God in the *Qur'ān* for a prohibited action. The Court first examined the *Qur'ān* to establish which verse prohibits the action of *zinā'* and at the same time fixes the punishment for it. It found that 24:2 prescribes one hundred stripes (*ǧalda*) each for the woman and man guilty of *zinā'*. The only other verse specifying punishment is 4:25 for a married woman slave who has committed adultery. God prescribes for her a punishment that is the half of that for a non-slave woman. The Court believes that this logically means only fifty stripes for an adulterous slave woman (at p. 158). Whether this implies that the husband-owner of a slave woman would still be subject to one hundred stripes but his wife to only fifty was not discussed by the Court. Stoning to death is not mentioned at all.

The Court is satisfied that there is no other verse which one could use to say that death is the penalty prescribed for illicit sex. It again quotes the *Qur'ān* to support its conclusion that where the verses are clear they suffice and there is no need to "turn to anything else for their interpretation" (at p. 159). In verses 5:47 and 50 one is to judge by what God says, and in verse 6:67, to follow what God has inspired. Verse 12:40 requires following the commands only of God, and 2:213 prescribes using the Book to settle conflicts.

The Court then proceeds nonetheless to study the *aḥādīṯ* because the Constitution of Pakistan provides that the laws are to conform to the *Qur'ān* and the *sunna* of the Prophet. The Court quotes in full 3:79 and 10:15. The latter two lay down the limits on the Prophet. He may not disobey the words of the *Qur'ān* or lead believers to follow him rather than God. The Court concludes that this means the *aḥādīṯ* of the Prophet may not contradict the *Qur'ān*. Otherwise the *aḥādīṯ* would be altering or abrogating the text of the *Qur'ān*, something which is prohibited. Therefore, to obey the *Qur'ān* and to follow the Prophet's *sunna*

[4] From the English version by 'Adullah Yūsuf 'Alī, Brentwood, Maryland, Amana Corporation, 1992. The Pakistani Court relied on an earlier edition, at p. 156 of the Judgment.

the Court have first to establish whether the *Qur'ān* is clear. Then it has to scrutinize the *aḥādīṯ* for consistency with the *Qur'ān* and with reason and relevancy. This implies that where the Court finds a *ḥadīṯ* contrary to the *Qur'ān* it may not follow it as binding.

Then the difficult task fell to the Court of how to deal with the *ḥadīṯ* of 'Umar that the verse on stoning (*raǧm*) had indeed been divinely revealed and orally recited, but had been forgotten to be included in the written collection of revelations.[5] This point of view was strengthened by the fact that there are contradictory verses in the *Qur'ān* on the punishment of *zinā'* and a promise to clarify the matter. Verse 4:15 speaks of confining those guilty of illict sexual relations as well as of their release upon repentance. But it also adds that God shall reveal more on the subject, as in the later verse 24:2 which refers only to whipping those committing *zinā'*. This did not prevent God from even later revealing via the *sunna* the punishment of stoning. The Court does not consider other *aḥādīṯ* that assert a Revelation by way of the *sunna* that were not included in the *Qur'ān*.[6] It contrasts the *sunna* of 'Umār with that of 'Alī. 'Alī too had applied stoning to death as a penalty, but made it clear that the stoning was according to the *sunna* of the Prophet, not according to the *Qur'ān* because 'Alī was not sure whether the Prophet had practiced stoning before or after the revelation in 4:15.[7] This implied a disagreement between 'Umar and 'Alī about whether there really had been a divine relevation on stoning.

The difference also raised the question of how the *sunna* of the Prophet allowing stoning was to be interpreted. As it could not be established whether stoning had been ordered before or after 4:15, and as the Prophet would not want to contradict the *Qur'ān*, then it would follow that the Prophet's *sunna* of ordering stoning was most likely a matter of following custom or a matter of discretion.

The Court then examined the *aḥādīṯ* in which the Prophet meted out expulsion from the community or stoning as the penalty for illicit sex. It noted from the start that the *aḥādīṯ* pose problems: They lack detailed description of the circumstances. It concludes that in the cases involving adulterers of the Israeli faith the Prophet was applying basi-

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[5] Dāwūd, *Sunan*, 2nd Ed., Cairo, al-Bābī al-Ḥalabī, 1983/1403, II, *ḥudūd: raǧm*, p. 498.

[6] Theodor Nöldeke, *Geschichte des Qorans*, 2. Aufl., bearbeitet von Friedrich Schwally, I, *Über den Ursprung des Qorans*, Leipzig, Dieterich'sche, 1909, pp. 248-261.

[7] Buḫārī, *Ṣaḥīḥ*, III-IV, Cairo, al-Bābī al-Ḥalabī, 1953/1372, p. 124: *kitāb: ḥudūd, bāb: raǧm al-muḥṣān.*

cally Mosaic law since the "stoning according to [the] Torah was never abrogated" (at p. 182). In other cases there is no reference to a specific divine revelation on stoning as in the 'Umar *ḥadīṯ*. This along with the refusal of 'Alī to confirm that the Prophet's occasional order to stone to death was or was not conforming to the *Qur'ān* forced the Court to rely on its own reasoning. The only way to explain the absence of reference to divine revelation and the seeming contradiction between the quranic penalty of whipping and the Prophet's order of stoning was to classify stoning as discretionary.

The Court did not discuss whether the *sunna* of 'Umar or 'Alī is to have the same rank as the *sunna* of the Prophet. It was important only to establish the nature of the *sunna* of the Prophet. While Article 2 of the Pakistani Constitution provides that the Islamic injunctions in the "Holy Quran and [general] Sunnah" shall *guide* [italics by author] legislators, Article 203D confines the Federal Shariat Court, when deciding whether a law is repugnant to Islam, to measuring the law in question against only the *Qur'ān* and the *sunna* of the Prophet alone.

Once having reached the conclusion that stoning is not a mandatory *ḥadd* punishment, but rather discretionary, the Court still had the problem of reconciling *ḥadd* and discretionary punishments. There is a contradiction between a discretionary death penalty and the a priori principle of *ḥadd* punishment, namely that no one may be punished for a quranic crime except according to punishments specified by God's Word. On how to deal with this contradiction, the Court was divided. The possibly discretionary (*ta'zīr*) nature of the Prophet's imposition of stoning for non-Israeli believers was rejected by one of the Court Justices (Agha Alī Hyder) on the ground that *ḥadd* means that the state may not impose any other penalty than that specified in the *Qur'ān* for a certain crime (at p. 169 ff.). Another Justice rejected stoning as *ta'zīr* because *ḥadd* means the maximum penalty, so that a *ḥadd* penalty of whipping could not be topped by a discretionary death penalty (p. 212, Justice Zakaullah Lodhi). Two other justices of the Court had no difficulties deeming death as a *ta'zīr* punishment (Pakistani judges may and do publish differing or dissenting opinions).

When one examines the reasons for this difference in opinion one sees that the Court refuses to rely solely on the jurists' opinions because they too are contradictory since they rely on differing *aḥādīṯ* (at p. 168). The individual justices varied on the extent to which they used their own reasoning and secondary sources (jurists' opinions based also on reasoning). The Justice who opposed stoning both as a mandatory and

discretionary punishment did so because the punishment for adultery could not have been meant by God to be more severe than the punishment for murder or robbery (at p. 174). The Justice favouring stoning as a discretionary punishment argued with the help of secondary literature that only lashes could have been God's prescribed punishment in light of the verse that the slave woman gets one-half. If stoning were the punishment, then it would have been impossible to mete out "half a death to an adulterous slave woman" (at pp. 176, 180). Therefore, it would have to be left to the discretion of the authorities to decide when to mete out stoning to slaves.

One out of the five justices hearing the case dissented (Karimullah Durrani). He found stoning to be a mandatory quranic punishment. He argued that Pakistan is to conform to Islamic law. His definition of Islamic law is very classical. Islamic law is defined in terms of its many sources: the injunctions as stated in the *Qur'ān* or in the *sunna; iǧmā'* of the Companions of the Prophet. He uses the *Qur'ān* to support his view that the state law in effect does not have to regard any one of these sources as the fundamental source. He relies first on the verses in which the word *ḥadd* is used. Verses 4:13 and 14 (on those who obey or disobey Allah and His Messenger) and 4:80 (who obey the Messenger obeys Allah) are especially important. The Justice interprets them to mean that in order to stay within the limits of God, one has to stay within the limits set by God and/or by the Prophet in the *aḥādīṯ*. The conjunctive word "and" does not have any particular meaning. The Justice reads it to mean "and/or". So when the Prophet ordered whipping in the case of an unmarried person and stoning for a married person, he was finding the accused both guilty of the same crime of *zinā'* prohibited in the *Qur'ān*. But the punishment differed because the same offence committed by a married person has a more aggravating effect (at p. 221). In effect there are two *ḥudūd*: one of the *Qur'ān* and one of the Prophet. Since the decisions of the Prophet to stone were also consistently followed by 'Umar and 'Alī, whatever their reasons, the consensus has to be followed as part of Islamic law. Because he does not seem to use the *Qur'ān* strictly as a book of law, Justice Durrani uses only the general Quranic verses to support his classical definition of what consitutes Islamic law. His colleagues, in contrast, examine the exact quranic terminology of the offence in question as the primary source of the Islamic law to be applied, and with which all other sources have to be brought into harmony. Thus, the first decision offers an interesting study in whether the *Qur'ān* should be the

primary juridical basis of contemporary Islamic law or serve only as a policy basis for accepting Islamic law as inherited from the past.

Case of zinā': *The Bakhsh Judgment of 1983*

The next case, Federation of Pakistan vs Hazoor Bakhsh, PLD 1983 FSC 255, involves the same parties as the first. As the Federal Shariat Court issued its judgment demanding that the Government rewrite the Zina Ordinance so that the only mandatory *ḥadd* punishment for consensual *zinā'* would be whipping, not death, the then Dictator Zia ul Haq issued Order V of 1981 (Constitution (Amendment) Order 1981) that required the Shariat Court to review its own prior decisions, which up to that time would have been final. The Court was constituted with new judges except for one from the old Court (Aftab Hussain, who favoured stoning as a discretionary punishment). Not surprisingly the new Court succombed to political pressure. No one debated quranic injunctions against interference in an independent judiciary. *Iǧtihād* was also not at issue.

The Court reopened the arguments. It reached, however, the same conclusion as the dissenting Justice in 1981. The Court decided for a definition of Islamic law that is not based on the *Qur'ān* as the primary, almost exclusive source of law, even when its provisions are clear (at p. 312). Nor is it based on the notion that the *sunna* will be followed only if consistent with the *Qur'ān* and where the *Qur'ān* is unclear. Rather the Court decided for a non-hierarchical concept of Islamic law as a mixture, consisting of many elements that have to be all given due consideration. A priori *aḥādīṯ* do not contradict the *Qur'ān* and vice versa. In the case of an apparent difference, the difference is to be explained by having the rule of the *ḥadīṯ* apply in one area and the *Qur'ān* for another. For example, quranic whipping applies to illicit sex between consenting adults who are unmarried, and *sunna* stoning to adulterous sex between two consenting adults who are married to someone else. In the past the *ḫawāriǧ* (Kharijite) jurists did not wish to accept *raǧm* just because it was not in the *Qur'ān*,[8] but their position has long been overriden. What emerges from the Court's second decision is that *iǧmā'* of the past controls. An *iǧmā'* of contemporaries is not tolerated.

[8] For a discussion see 'Azmī Muḥammad Shafīq Al-Ṣaliḥī, *The Society, Beliefs and Political Theories of the Kharijites as Revealed in Their Poetry of the Umayyad Era*, Ph.D., London, 1975, I, p. 106.

While the emphasis in the 1983 judgment is on *aḥādīṯ*, quranic verses other than those considered in the 1981 judgment are also cited. Verses are cited to support a concept about the non-hierarchical role of *Qur'ān* in Islamic law. Verses 2:2 and 1:5 are cited to show that the *Qur'ān* is to be regarded as a book of "Guidance" (at p. 314). The Court is implying that it is not a book of law.[9] The *sunna* are regarded as examples of the application of the *Qur'ān* (at p. 318). Hence, emphasis is placed not on the provisions of 24:2 for whippping, but the sentences that enjoin believers not to have any pity for those who engage in *zinā'*. The application by the Prophet then of *raǧm* as punishment is seen as fulfilling the call for harsh treatment of *zinā'* offenders (p. 320).

The *Qur'ān* is also seen as a continuation of past monotheistic traditions, as made clear in the opinion submitted by one of the panel of juriconsultants to the Court. The Shariat Court maintains under Article 203E of the Constitution a list of Islamic law experts. The Court is free to agree or disagree with their submissions.The jurisconsult in question argued (though this was not accepted by the Court) that verses 5:43 and 44 refer to those of Israeli faith who come to the Prophet for a decision under the Mosaic law, which is deemed to be Allah's law and still valid for Muslims. This combined with the *aḥādīṯ* reporting the Prophet ordering stoning for adulterous members of the Israeli faith is taken to refer to the fact that *raǧm* remains in effect for Muslims as God's people just as for Israelis (at p. 292ff.).

Case of zinā': *The Razzaq judgment of 1997*

Since the 1983 decision of the Federal Shariat Court there has not been reported any comparable challenge to the islamicity of the law punishing *zinā'*. The next decision, quite recent, Muḥammad Ibrahim vs Abdul Razzaq, 1997 Pakistan Criminal Law Journal 263, is an example of how the courts can correct to a certain extent, yet be influenced by popular interpretations of what the *Qur'ān* enjoins. According to the facts of the case Razzaq after saying his prayers had found his wife in the company of another man in full daylight. They were together in the same room. He shot and killed her on the spot, while the man managed to escape. Razzaq was sentenced to 3 years imprisonment. Razzaq confessed his deed, but argued that no conviction could be awarded against him under the Pakistani penal statutes. In effect, he

[9] See El-Awa above in Ftn. 1.

was contesting that any state law convicting a husband in such circumstances breached quranic injunctions. The Court did not wish to enter into a full scale debate on incompatibility between certain provisions of the penal statute and Islamic law, since at the time of the case the fate of the criminal code was chaotic. Parliament was in the throes of rewriting the penal statutes so as to incorporate the penal provisions of Ordinances issued under Zia ul Haq's regime as well as clear up certain ambiguities in the Ordinances. The Court, hence, limited its judgment to considering the defence arguments in the light of other quranic verses and the compatibility of the relevant penal code provisions with the latter.

The core of the defence argument the Court has to deal with is that the *Qur'ān* allows a husband two options in case of a wife who he alleges is committing *zinā'*: to divorce her or to kill her. The husband relied first on general verses condemning immorality: 2:173 (exculpating one who transgresses the limits of God out of necessity) and 5:2 (help not one another in sin). The Court rejects the verses as irrelevant to the facts of the case. Razzaq had found his wife and the man fully clothed. It was daylight and there were many people around at a neighbouring wedding party.

Razzaq then relied on the specific verses regulating relations between husbands and wives and killing. He cited 4:34 that provides that men are protectors of women and that women of ill-conduct are to be admonished. 4:25 enjoins women to be chaste, not lustful nor taking paramours. Under 17:33 he argued that he was allowed to slay for it was for a just cause.

The Court equally rejects these defence citations. It relies first on its own social and political reasoning that provocation on suspicion of *zinā'* would result in any and every woman being killed. It then refers to protection that the quranic provisions offer to society to prevent unjustified killings. The Court cites 4:15 that requires the evidence of four witnesses to the act of illicit intercourse. It is important to the Court that these quranic provisions, the cornerstone of the law of *zinā'*, not be undermined by husbands thinking that the *Qur'ān* has given them a free hand to kill their wives on the basis of their own individual eyewitnessing of what they thought to be *zinā'*.

As for the defence argument that 4:34 allows a man to protect the honour of his women, the Court does not deal in great detail with this quranic provision. It does not consider whether the defence is reading the "honour" verses out of context, for 4:34 deals with protection in the context of the law of family maintenance. The Court concludes

without elaborate justification that the right to honour is a "fundamental right" conferred by the *Qur'ān*, but holds that the exercise of this right will be decided on a case by case basis and will depend on how much evidence the husband can adduce about a *zinā'* relationship. The Court then decided to enhance the imprisonment of the husband, but only by two years more (five years instead of three). The end result, a relatively mild sentence, implies that the Court is prepared to accomodate contemporary social attitudes (of males) as to how important honour is. It accomplishes this by firstly taking quranic "protection of women" provisions out of context. This justifies then not attaching stringent consequences for husbands who breach the requirement in 4:15 of four witnesses. The absence of any reference to the *sunna* of the Prophet frees the Court of contrasting the current attitudes of husbands as "protectors of honour" with those of husbands in the past who also wanted to kill their wives if found with another man. For example, Hilāl bin 'Umayya had found his wife in a compromising situation. Instead of killing her on the spot, he went to the Prophet for judgment.[10]

The reliance of the defence and the Court on the *Qur'ān* with hardly reference to the *aḥādīṯ* literature is evidence of a development that the jurisprudence in Pakistan has not definitively rejected the approach that the Court took in 1981 in the Bakhsh case above, so that the *Qur'ān* can still be treated as the basis of law in an hierarchy of sources of law.

What is also striking about the decision is that the Court did not take the opportunity to refer to the quranic verses that punish unfounded suspicion with lashes nor explicitly refer to 42:37, which enjoins those who are angry to avoid doing a greater crime and therefore to forgive.

The failure of the Court to refer to the verses (24:4ff.) punishing suspicious husbands with eighty lashes is surprising as the Court has had several occasions to apply the law of *qaḏf*, as we shall see in the following series of cases.

Case study of qaḏf: *The Bakhtiar Judgment of 1986*

The first case is Bakhtiar Said Muḥammad vs Dure-e-Shahwar, PLD 1986 FSC 187. On the facts of the case the husband sent a divorce deed to his wife, stating the grounds of divorce. He said that she was

[10] Dāwūd, *Sunan*, 2nd. Ed., Cairo, al-Bābī al-Ḥalabī, 1983/1403, II, *kitāb: ṭalāq, bāb: li'ān*, p. 566.

unchaste and that the children came from an adulterous relation. The wife filed a charge of *qaḏf* against him, demanding that he be punished with eighty stripes under the Qazf Ordinance of 1979. The husband in turn filed a charge of *zinā'* against his wife. The wife asked for the *liʿān* procedures before the Court as provided for in the Qazf Ordinance. The husband contended that this requirement breached Islamic injunctions, specifically 24:6. He believed that all he had to do if he had no evidence other than his own solitary evidence was to swear four times by Allah, which amounted then to the truth. The Court rejects the husband's position. The Court first confirms the islamicity of the provisions of the Ordinance. They are practically a replica of *sūra* 24 and therefore there can be no doubt about the legality and validity of the Ordinance (at p. 192). The Court then proceeded to examine the Quranic verses. It interprets 24:6 to mean that "bearing witness four times" implies bringing witness before a court. Furthermore, 24:6 has to be read in conjunction with 24:8, which allows the wife to bear witness four times that her husband is lying. An independent body like a court is necessary to hear both if both are to have a fair chance to exonerate themselves. The Court confirmed its interpretation of the *Qur'ān* with short references to *aḥādīṯ* in which the Prophet heard cases of *liʿān*.

Case of qaḏf: *The Judgment of Nek Bakhat of 1986*

The next case is Nek Bakhat vs The State/Muḥammad Rafiq vs The State, PLD 1986 FSC 200. On the facts of the case the husband had accused his wife of *zinā'*. He did not have the required four witnesses for a conviction of *zinā'* liable to the *ḥadd* (death) penalty. He had only enough witnesses and circumstantial evidence to prove *zinā'* liable to *taʿzīr* punishment (§10 of the Zina Ordinance). It appears that the wife had not charged her husband with *qaḏf*. He brought her before the Court. He accused her of *zinā'* under the Qazf Ordinance and of *zinā'* under the Zina Ordinance. Under the Qazf Ordinance he took an oath of *liʿan* that he was telling the truth. As permitted under the Qazf Ordinance, the wife too took an oath that he was lying. The Court and the parties were in agreement that the *liʿān* procedure had exonerated the wife of *zinā'* liable to *ḥadd*. This was on the basis of the Qazf Ordinance which provides that a wife who otherwise accepts the husband's accusation is subject to *ḥadd* (death). Hence, a wife who does not accept her husband's accusation is freed of the *ḥadd* penalty.

Because, however, the Qazf Ordinance did not expressly free her of the *taʿzīr* penalty, the question was whether her oath exonerated her also from her husband's accusation of *zinā'* liable to *taʿzīr* punishment under the Offence of Zina Ordinance. The Court was divided in its answer. Four Justices concluded that the wife is still subject to a *taʿzīr* punishment. One Justice dissented, saying that once a wife has taken the oaths then she is free of all charges of *zinā'* brought against her, whether *ḥadd zinā'* or *taʿzīr zinā'*.

To reach their conclusion, the majority of Justices did not analyse the *Qur'ān*. They took cognizance of the fact that two leading jurists of the past, Ibn Qudāma and Šāfiʿī had already disagreed on how to interpret the word *ʿaḏāb* in 24:8 (the wife averts punishment (*ʿaḏāb*) with the oath). Ibn Qudāma was quoted to be of the opinion that only a *ḥadd* punishment is meant. Šāfiʿī was said to opine that if the greater punishment of *ḥadd* is averted then the lesser *taʿzīr* punishment is also included and averted. The Justices felt it was only their task to decide how to choose between the two jurists. For this purpose it then examined the terms of the Qazf Ordinance to determine which of the jurists' opinions was more compatible with the statute. The Ordinance provides that if the wife does not take the oaths, then she is subject to the *ḥadd* penalty of death (this being obviously an exception to the requirement of the Zina Ordinance of four witnesses for a *ḥadd* penalty).

But the Ordinance does not go on to say that if she does take the oath then she shall be acquitted of any charge of *zinā'* whether liable to *ḥadd* or *taʿzīr*. If the law-maker had wanted to adopt the opinion of Šāfiʿī then it would have made a provision for exoneration. The lack of such a provision implies that the position of Ibn Qudāma was adopted, i.e. she is still liable for a *taʿzīr* punishment under the Zina Ordinance.

The opinion of the majority of justices rests on the assumption that the issue is whether charging a woman of *zinā'* liable to *taʿzīr* punishment after she has taken the oath that her husband is lying conforms to the positive law. The dissenting Justice seems to assume that another issue is at stake, i.e. if a statute based on the *Qur'ān* is unclear about what punishment is due for a woman who has taken the oath, is it against the *Qur'ān* to punish such a woman? Therefore, the dissenting justice examines the provisions of the *Qur'ān* and the circumstances of their revelation as reported in the *sunna* of the Prophet regarding the case of Hilāl bin 'Umayya (see footnote10 above). The dissenting Justice stresses that the *sunna* of the Prophet makes no distinction between the kind of evidence a husband brings for a *taʿzīr* penalty, whether it is cir-

cumstantial, documentary, personal, etc. This approach, the Justice notes, is wider than the *Qur'ān*, which refers only to cases in which the husband is his only witness (24:6). To reach his final conclusion the Justice relies on logic. In his view the purpose of the *li'ān* proceedings is to determine who is lying. If both spouses take the oaths, then neither is lying, and this "demolishe[s] the very edifice on which the husband had raised the foundation of allegation against his wife" (at p. 184). Therefore all charges of *zinā'* must fall and the wife acquitted of *zinā'* liable to *ta'zīr* penalty.

Curiously the dissenting Justice does not make an analysis of the quranic word *'aḍāb* (punishment). It connotes torture. If we take the point of departure of one of the Muslim jurisconsults in the 1983 Bakhsh case above that it might be helpful to ask which of the Mosaic laws Allah has repealed, then the word could be referring to the Mishnaic law. According to the latter a husband could accuse his wife of adultery before two witnesses (not even before a court) and could then impose on her the tortuous ordeal of drinking bitter barley water. If her belly swelled then she was deemed guilty. If not, then she was to go without punishment and continue to have children.[11] It would appear that the *Qur'ān* rejects the unequal treatment of the spouses. Both may take oaths and the wife is no longer to be subject to the awful ordeal.

Conclusions

The foregoing analysis of some of the key judgments of the higher courts in Pakistan on *zinā'* and *qaḍf* shows that a jurisprudence fully consistent with an hierarchal approach to sources of law has not yet been developed. An hierarchal legal system is based on the premise that among the many sources of law, one source is deemed the fundamental source. As the basis from which all other laws theoretically are to derive, it may override and repeal all other laws that are not in fact consistent with it. The duty of the courts and the legislature is to assure the internal consistency of the legal system in accordance with the fundamental law. In Pakistan the Constitution appears to be the fundamental law (Articles 5(2), Chap I on Fundamental Rights).[12] It

[11] Jacob Neusner, *A History of the Mishnaic Law of Women*, IV, Leiden, E.J. Brill, 1980.

[12] In August 1998 the Constitution (Fifteenth Amendment) Act, 1998 was proposed in Parliament to make the "Quran and sunna of the Prophet . . . the supreme law of Pakistan".

designates as the second source of law, the Islamic injunctions, with which all positive laws enacted by the legislature are to conform (Article 2A). It also empowers the Shariat Court to declare only certain categories of the positive laws incompatible with the Islamic injunctions. It may not declare the constitutional provisions as unislamic. The other courts, the High Court and the Supreme Court, presumably may exercise their inherent powers to examine the constitutionality of any law.

By way of contrast the approach of the courts is more diffuse. For judges it seems that what is crucial is doing justice in a particular case either to the individual involved or to the social/political demands of the case. When necessary the courts will establish the hierarchy of sources of law, depending on what is best for achieving social, political or individual justice. At times the *Qur'ān* will be more important than *sunna* as in the case Razzaq case of honour killing and in the Bakhsh case of 1981 for determining whether the death penalty for consensual *zinā'* conforms to the *Qur'ān*. Other times the *aḥādīṯ* and the *iğma'* of the past will be the basic source of law as in the Bakhsh case of 1983 for re-establishing the death penalty. Other times when it is established that the jurists of the past had differing interpretations of the quranic verses, the courts rely on the positive law as the determining factor and try to establish which of the differing quranic interpretations best conforms with the intent of the postive law as in the Nek Bakhat case. Given the difficullties of resolving the great difficulties of understanding what is meant in the *Qur'ān* and of resolving the differences between the *Qur'ān* and the *sunna* the courts have developed essentially a non-hierarchical approach to determining the law. The *Qur'ān* does not serve as the overriding basic source of law. This is not because the courts are reluctant to interpret the Holy Scriptures[13] or to use *iğtihād*. It is rather the reasoning of the judges that is the basis of the law. This reasoning rests on their perceptions of what is best for social and political justice, just as it was observed in the 1983 Bakhsh case that the Prophet had applied *raǧm* for political reasons (at p. 305), implying, it was not for quranic jurisprudential reasons. Once these are articulated, then the search begins for which source of Islamic law best supports these premises.

One historical source of law that the courts seem to have neglected is the *tafsīr* literature. Why this is so and whether the courts would be

[13] Harris Birkeland, *Old Muslim Opposition Against Interpretation of the Koran*, Oslo, I Kommisjon Hos Jacob Dybwad, 1955, p. 42.

willing to expand the number of sources of law to include *tafsīr* are questions for further research in this area.

As for the development of an Islamic law, the cases analysed above are indicative of the courts being more concerned with doing justice to the entire history of the law than with the future of Islamic law. One area where future development is needed is that of legal terminology. As seen in the Bakhsh case of 1981 and the Nekt case, the words *ḥadd*, *taʿzīr*, and *liʿān* are terms that have come to take on meanings that are far from the quranic words used to describe penalties in the cases of *zinā'* and a wife who takes an oath against her jealous husband. A more systematic and presumably more stabilizing basis for the future development of Islamic law may lie in the courts developing a legal terminology that has a firmer basis in the quranic terminology. Otherwise the old debates of the past will continue endlessly, as Justice Aftab Hussain observed in the 1983 Bakhsh decision. It cannot seem to be in the interest of good law that one occupies oneself mainly with trying to figure out what side one is going to take in an age-old debate.